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STATE OF HAWAI'I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE,

Plaintiffs,

v.

STATE OF HAWAI'I,

Defendant.

CIVIL NO. 18-1-1376-09 GWBC

DEFENDANT STATE OF HAWAII'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT FILED ON OCTOBER 25, 2018; DECLARATION OF ROBYN B. CHUN, EXHIBITS "W"-"Y"; CERTIFICATE OF SERVICE

Date: January 24, 2019
Time: 10:00 a.m.
Judge: Honorable Gary W.B. Chang

DEFENDANT STATE OF HAWAII'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT FILED ON OCTOBER 25, 2018

Plaintiffs' Cross-Motion for Summary Judgment must be denied not only for the reasons that support the State's Motion for Summary Judgment (which are hereby incorporated herein by reference) but also because Plaintiffs lack

standing to bring this lawsuit and their reliance on the *Jensen v. Turner*, 40 Haw. 604 (1954) as support for their contention that the title of Senate Bill No. 2858 is overbroad is misplaced.

I. Plaintiffs Lack Standing to Bring this Action

Plaintiff League of Women Voters is a self-described "nonpartisan Hawaii nonprofit corporation that works to improve government function and impact public policies through citizen education and advocacy." *See* Complaint, ¶ 6 at 1. Similarly, Plaintiff Common Cause "is a national nonprofit grassroots organization dedicated to upholding the core values of American democracy . . . ." *Id.*, ¶ 7 at 3. Together, Plaintiffs have sued the State alleging that Senate Bill ("S. B.") No. 2858 violated Article III, sections 14 and 15 of the Hawai'i Constitution and as a result, Act 84 is void. *Id.*, ¶ ¶ 39, 45 at 7, 8. As relief, Plaintiffs seek an order "declaring that (1) the process for adopting Act 84 was unconstitutional; and (2) Act 84 is void." *Id.* at 8. Plaintiffs lack standing to bring this action.

In *Mottl v. Miyahira*, 96 Hawai'i 381, 23 P.3d 716 (2001), the plaintiffs, UHPA, the labor union for the University of Hawai'i faculty, individual faculty members and certain legislators sued the Director of Budget and Finance and the Governor (collectively, "State defendants") for declaratory and injunctive relief to restore certain funding to the University. The plaintiffs alleged that they sought to "enforce the right of the public to see that the funds appropriated by their legislature are in fact released to the public agencies for which the funds were intended without undue interference from the executive

branch." *Id.* at 391, 23 P.3d at 726. The parties filed cross-motions for summary judgment and the court granted summary judgment in favor of the State defendants and the plaintiffs appealed.

On appeal, the State defendants argued, among other things, that the plaintiffs lacked standing to bring their lawsuit and the supreme court agreed. According to the court, "[s]tanding is concerned with whether the parties have the right to bring suit" and "[a] plaintiff without standing is not entitled to invoke a court's jurisdiction." *Id.* at 388, 23 P.3d at 723 (citations omitted).

While acknowledging that standing in an action for declaratory relief "interposes less stringent requirements for access and participated in the court process" (*id.* at 389, 23 P.3d at 724) and that courts have broadened standing in certain types of cases, the court held that standing requires that plaintiffs have suffered an injury in fact. *Id.* at 391, 23 P.3d at 726. To determine whether plaintiffs have the requisite interest in the outcome of a lawsuit, the court applied a three-part test that:

> requires a showing that: (1) they have suffered an actual or threatened injury as a result of the defendants' conduct; (2) the injury is traceable to the challenged action; and (3) the injury is likely to be remedied by a favorable judicial decision.

Id. (citation omitted). *See Bush v. Watson*, 81 Hawai'i 474, 479, 918 P.2d 1130, 1135 (1996). As to the first part of the test, "the plaintiff 'must show a distinct and palpable injury to himself [or herself]' " as opposed to an injury that is "abstract, conjectural, or merely hypothetical." *Mottl* at 389, 23 P.3d at

724 (citations omitted). With respect to the first part of the test, the court concluded that:

> [b]y asserting that they seek to ensure that the executive Branch disburses legislatively appropriated funds to their intended recipients in accordance with the law, the plaintiffs are 'seeking to do no more than vindicate [their] own value preferences through the judicial process.

Id. at 391, P.3d at 726 (citations omitted). *See Sierra Club v. Morton*, 405 U.S. 727 (1972) (unless plaintiff could show some concrete injury, plaintiff was asserting a value preference and not a legal right). According to the supreme court,

> [t]he proper forum for the vindication of a value preference is in the legislature, the executive, or administrative agencies, and not the judiciary. For it is in the political arena that the various interests compete for legal recognition.

Mottl, at 392, 23 P.3d at 727. Relying on the United States Supreme Court's decision in *Sierra Club*, the court similarly held that a special interest in a problem is not sufficient to confer standing and that the plaintiffs therefore lacked standing to sue the State defendants. *Id.*

Here, Plaintiffs have not suffered <u>any</u> injury, yet alone a distinct and palpable injury, let alone <u>any</u> injury, as a result of the legislative process used to enact Act 84. In fact, they did not even show any interest in S.B. No. 2858. Neither the League of Women Voters nor Common Cause submitted testimony either in support or in opposition to the original version of S.B. No. 2858 (requiring the Department of Public Safety to establish performance indicators

and submit reports regarding prisoner rehabilitation).[1] *See* Declaration of Robyn B. Chun attached hereto and incorporated herein by reference ("Chun Declaration"). Subsequently, when the hurricane preparedness text was substituted into S.B. No. 2858, neither the League of Women Voters nor Common Cause submitted testimony in support or opposition or like others, to complain about the substitution.[2] *Id.* Whether the original version of S.B. No. 2858, or the hurricane preparedness version of the bill was enacted apparently did not matter to Plaintiffs.

Because Plaintiffs have suffered no injury, there is no need to reach the second and third parts of the test or inquiry. But as to the second and third parts of the test, there can be no injury traceable to the legislative process that they challenge and a favorable decision in this case will not provide Plaintiffs with any relief.

In any event, both versions of S.B. No. 2858, the hurricane preparedness version and the prisoner rehabilitation version, were enacted as Act 84 and Act 212 (in substance, the original version of S.B. No 2858), respectively. Therefore, even if Plaintiffs were genuinely interested in, or affected by, these

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[1] Common Cause did submit testimony in support of S. B. No. 2861, S.D. 2, H.D. 1. *See* Testimony in support submitted by Corie Tanida, Executive Director, Common Cause Hawaii, Exhibit "W" to the Chun Declaration attached hereto.

[2] *See, e.g.*, Testimony on S.B. No. 2858, S.D. 2, H.D. 1 dated March 28, 2018 submitted by OHA; Testimony submitted by Will Caron, Social Justice Action Committee Chair, Young Progressives Demanding Action – Hawaii, Exhibits "X" and "Y" to the Chun Declaration attached hereto.

measures, they suffered no injury as a result of the legislative process used to enact them.

In short, Plaintiffs here "are seeking to do no more than vindicate [their] own value preferences through the judicial process." *Mottl* at 391, 23 P.3d at 726 (citations omitted). Their value preferences are expressly stated in their Complaint where they allege that: " 'Gut and replace' legislation is abhorrent to basic principles of democracy"; "Gut and replace legislation reflects a fundamentally undemocratic disregard for the public" and "This action seeks to enforce the constitutional provisions that prohibit the State from using processes that avoid input from the electorate into how the people of Hawai'i should be governed." *See* Complaint, ¶¶ 1, 4 and 5 at 1-2.

Even assuming they are/were sincerely interested in Act 84, that "special interest" is not an "injury in fact" and is "insufficient to invoke judicial intervention." *Id.* at 392, 23 P.3d at 727. In short, Plaintiffs do not have standing to bring this action and this Court lacks jurisdiction to decide Plaintiffs' claims.

II. The Title of S.B. No. 2858 is Not Misleading or Overbroad for Legislation

Plaintiffs rely on *Jensen v. Turner*, 40 Haw. 604 (1954), a case where the supreme court held that the title of a bill was too limited or specific and therefore violated the Organic Act. *Id.* at 611-612. According to the court,

> [i]f the title to the amendment had been merely to amend chapter 6 relating to elections, there would be a much better argument for sustaining the law as this provision of the

> Organic Act should be liberally construed, particularly as to amendatory statutes.

Jensen, 40 Haw. at 608. Thus, according to the court, in light of the liberal construction to be given the subject-title requirement, a general title is preferable. The court further explained that the subject-title requirement:

> is satisfied if provisions of the Act are naturally connected and expressed in a general way in the title – nor need all the provisions be referred to in the title – yet a sweeping change such as contended for, which would make radical changes in both the primary and election laws, should be included in the title to give proper notice to legislators and to the electorate at large. At least the title should not be so worded as to mislead by appearing to provide merely for the purpose and use of voting machines.

Id.

Here, the title "A Bill for an Act Relating to Public Safety" meets the criteria set out in *Jensen*. The hurricane preparedness subject is expressed in a general way in the public safety title and the title is not misleading (where, for example, the bill pertains to more than one subject but only one is reflected in the title). Further, unlike the bill in *Jensen*, S.B. No. 2858 makes no "sweeping" or "radical" change in the requirements for the design and construction of state buildings that should be included in the title; it simply requires that hurricane resistant criteria be considered in the construction of new public schools. In short, Plaintiffs' reliance on *Jensen* is misplaced.

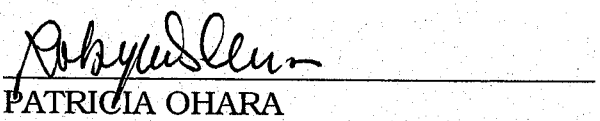
III. CONCLUSION

For the foregoing reasons, in addition to those stated in the State's Memorandum in Support of its Motion for Summary Judgment and its Reply,

the State respectfully urges the Court to grant summary judgment in favor of the State and against Plaintiffs.

DATED: Honolulu, Hawai'i, December 21, 2018.

RUSSELL A. SUZUKI
Attorney General



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STATE OF HAWAI'I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE, Plaintiffs, vs. STATE OF HAWAI'I reviewed all of the testimony that was submitted for Senate Bill No. 2858 and for Senate Bill No. 2861 I, Defendant.	CIVIL NO. 18-1-1376-09 GWBC DECLARATION OF ROBYN B. CHUN; EXHIBITS "W" - "Y"

DECLARATION OF ROBYN B. CHUN

I, ROBYN B. CHUN, hereby declare pursuant to Rule 7(g), Rules of the Circuit Court for the State of Hawai'i reviewed all of the testimony that was submitted for Senate Bill No. 2858 and for Senate Bill No. 2861 that:

1. I am an attorney with the Department of the Attorney General, State of Hawaii, counsel for Defendant State of Hawai'i herein.

2. I make this declaration based on my personal knowledge and am competent to testify as to the matters set forth herein.

3. All of the exhibits attached hereto are copies of documents that are posted on the Hawai'i State Legislature's website, www.capitol.hawaii.gov. I printed each exhibit from that website.

4. Pursuant to Rule 201(b), Haw. R. Evid., the Court may take judicial notice of the documents attached as exhibits hereto as they are "capable of

accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

5. In addition, pursuant to Hawai'i Rules of Evidence, Rule 803 (8), the attached exhibits are admissible as an exception to the hearsay rule and are self-authenticating under Hawai'i Rules of Evidence, Rule 902(5).

6. Attached hereto as Exhibit "W" is a true and correct copy of the testimony that Corie Tanida, Executive Director of Common Cause submitted in support of Senate Bill No. 2861, S.D. 2, H.D. 1.

7. Attached hereto as Exhibit "X" is a true and correct copy of the testimony that OHA submitted regarding Senate Bill 2858, S.D. 2, H.D. 1.

8. Attached as Exhibit "Y" is a true and correct copy of the testimony that Will Caron, Social Justice Action Committee Chair, Young Progressives Demanding Action, submitted regarding Senate Bill No. 2858, S.D. 2, H.D. 1.

9. I reviewed all of the testimony that was submitted for Senate Bill No. 2858 and for Senate Bill No. 2861 and did not find any testimony submitted by the League of Women Voters for either of those measures.

10. I reviewed all of the testimony that was submitted for Senate Bill No. 2858 and for Senate Bill No. 2861 and found that Common Cause submitted only that testimony that is attached hereto as Exhibit "W".

I, ROBYN B. CHUN, do declare under penalty of law that the foregoing is true and correct.

DATED: Honolulu, Hawaii, 12/21/18.

Robyn B. Chun

ROBYN B. CHUN

Common Cause

Hawaii

Holding Power Accountable

House Committee on Finance
Chair Sylvia Luke, Vice Chair Ty Cullen

04/03/2018 1:30 PM Room 308
SB2861 SD2 HD1 – Relating to Public Safety

TESTIMONY / SUPPORT
Corie Tanida, Executive Director, Common Cause Hawaii

Dear Chair Luke, Vice Chair Cullen, and members of the committee:

Common Cause Hawaii supports SB2861 SD2 HD1 which would require the Department of Public Safety to develop performance measures to evaluate the outcomes of the programs on which it reports, to report on an annual basis data relevant to program participation, and to post the reports on the DPS website.

Currently, tax money supports the Department, but the public has little knowledge or understanding of its programs, record of success, or degree of participation of inmates in programs. Regular reporting of this information, both to the legislature and on the DPS website will give the public a greater understanding of the activities of DPS.

Thank you for the opportunity to testify in support of **SB2861 SD2 HD1**.

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EXHIBIT "W"

OFFICE OF HAWAIIAN AFFAIRS
Legislative Testimony

SB2858 SD2 HD1
RELATING TO PUBLIC SAFETY
House Committee on Public Safety

March 28, 2018 3:00 p.m. Room 308

The Administration of the Office of Hawaiian Affairs (OHA) will recommend that the Board of Trustees offer the following **COMMENTS** on SB2858 SD2 HD1, which would ensure state buildings built after July 1, 2018 adhere to State Civil Defense standards of disaster preparedness. Although protecting Hawai'i state buildings and citizens is a laudable goal, this draft would abandon the critically important purpose of previous drafts to require the Department of Public Safety (PSD) to collect, aggregate, and publicly report data relating to key enumerated performance indicators. **This previous draft would promote important legislative and community oversight, and provide information that may be critical to the enactment of much-needed reforms to our criminal justice system.**

Decades of a traditional criminal justice approach have led to the highest prison population in Hawai'i's history. Between 1977 and 2008, the number of people incarcerated in Hawai'i increased by more than 900 percent, between 1977 and today, our incarcerated population increased by 1,400 percent.[1] The Native Hawaiian community has been particularly impacted by this increase, making up 40% of our current prison population.[2] Moreover, the overrepresentation of Native Hawaiians in the criminal justice system indicates larger systemic issues, such as implicit bias and disparate treatment in interactions from arrest, to adjudication, to final release.[3] **Accordingly, OHA has long advocated for criminal justice reform that would thoroughly examine and effectively implement evidence-based incarceration alternatives, that can improve public safety, effectively rehabilitate pa'ahao, reduce recidivism, and save taxpayer dollars.[4]**

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[1] THE OFFICE OF HAWAIIAN AFFAIRS, THE DISPARATE TREATMENT OF NATIVE HAWAIIANS IN THE CRIMINAL JUSTICE SYSTEM 17 (2010), *available at* http://www.oha.org/wp-content/uploads/2014/12/ir_final_web_rev.pdf.
[2] In contrast, Native Hawaiians only represent 24% of the general public in Hawai'i. *Id.* at 36.
[3] OHA's 2010 study found that the disproportionate impact of the criminal justice system on Native Hawaiians accumulates at every stage, noting that Native Hawaiians made up "24 percent of the general population, but 27 percent of all arrests, 33 percent of people in pretrial detention, 29 percent of people sentenced to probation, 36 percent admitted to prison in 2009, [and] 39 percent of the incarcerated population." *Id.* at 10. Moreover, controlling for many common factors including type of charge, the study revealed that Native Hawaiians were more likely to be found guilty, receive a prison sentence, and receive a longer prison sentence or probation term than most other ethnic groups. *Id.* at 28-38.
[4] The Native Hawaiian Justice Task Force recommended several options to address systemic issues resulting in the overrepresentation of Native Hawaiians in the criminal justice system. These included reconsidering several legislative proposals from the 2011 Justice Reinvestment Initiative that were not originally passed or implemented, investing in early intervention programs, increasing public defender funding, expanding

EXHIBIT "X"

The Native Hawaiian Justice Task Force, in its 2012 report, found that data collection, integration, and infrastructure needed to be improved at various levels within the criminal justice system.[5] The Task Force noted that an analysis of additional control variables "would provide a richer understanding of why Native Hawaiians remain disproportionately represented in the criminal justice system."[6] Consistent with the Task Force's report, this measure could help to provide robust and comprehensive data, which can inform the exploration, development, and implementation of policies and programs that meaningfully address the costly and growing impacts of our criminal justice system on Native Hawaiians and the larger community.

Therefore, OHA respectfully requests that the Committee amend this bill, to revert to the original or amended Senate versions of this measure. Mahalo for the opportunity to testify on this measure.

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implicit bias training, strengthening supervised release programs, executing compassionate release consistently, supporting indigenous models of healing alternatives such as pu'uhonua, and bolstering reintegration programs and services to better prevent recidivism. *Id.* at 27-30.

[5] OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN JUSTICE TASK FORCE REPORT (2012) at 8, *available at* http://www.oha.org/wp-content/uploads/2012NHJTF_REPORT_FINAL_0.pdf.

[6] *Id.*

EXHIBIT "X"

LATE

YOUNG PROGRESSIVES DEMANDING ACTION

Aloha Chair Luke, Vice Chair Cullen and members of the House Committee on Finance,

The members of the Young Progressives Demanding Action – Hawai'i offers comments on SB2858 SD2 HD1. While we do not oppose the construction of hurricane shelters and the concept of planning for increasingly destructive storms in the 21st century, we are nevertheless disappointed that the House Public Safety committee decided to gut an important bill that would have required the Department of Public Safety (DPS) to report on program outcomes.

We desperately need more information from the DPS in order to craft a "smart justice" policy that advances programming and restorative justice techniques over incarceration and punishment. Such an approach will save the state millions of dollars, and create far better outcomes for offenders who will be able to reintegrate in society effectively, reducing recidivism and keeping out communities safer.

The previous version of this bill represented a step toward accountability and transparency when dealing with corrections and the criminal justice system. People who are committed to this system are stripped of certain rights because they have been deemed to have violated some part of the social contract. They are also locked away from sight and mind of the public, physically, emotionally and mentally cut off from their loved ones and advocates. As a result, they are particularly vulnerable to civil and human rights violations.

We feel it is critical that some form of legislation advancing this data-driven approach to criminal justice reform be passed this year. So while we do not oppose this bill, we ask that the Finance Committee please schedule SB2861 SD2 HD1 and pass it.

This session has been a disappointment for criminal justice reform: Many good bills aimed at assessing and reforming pretrial incarceration, reforming the bail system and establishing more effective incarceration practices died. We currently have two task forces studying this issue, and these task forces were used as cover to kill many of these bills. However, without specific data, task forces currently

EXHIBIT "Y"

looking at both avenues of reform will continue to be limited in their ability to formulate good recommendations on policy for this legislature to act on.

Even basic information, like the demographics of our jail and prison population and the cost of incarceration, are only available upon request and are difficult to acquire from the department. More and more states are adopting data-driven approaches to incarceration to implement truly best practices in reducing rates of recidivism, taxpayer costs, and to improve the safety of their communities. And their progress has been well-documented now. Hawai'i should join this "smart justice" approach and implement a comprehensive data collection system. This information must be made publicly available. These bills will help the state to develop sound policies that improve our communities, improve safety, and promote justice, and we ask that you support both and pass them through committee today.

Mahalo,

Will Caron
Social Justice Action Committee Chair
Young Progressives Demanding Action – Hawai'i

EXHIBIT "Y"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

LEAGUE OF WOMEN VOTERS OF HONOLULU and COMMON CAUSE, Plaintiffs, vs. STATE OF HAWAI'I, Defendant.	CIVIL NO. 18-1-1376-09 GWBC CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the forgoing document was duly served by U.S. Mail, postage prepaid, to the following party listed below:

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Attorney for Plaintiffs

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Attorney for Hawai'i State Legislature

DATED: Honolulu, Hawai'i, December 21, 2018.

PATRICIA OHARA
ROBYN B. CHUN
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Attorneys for Defendant STATE OF HAWAI'I